

Before the  
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In the Matter of )  
Distribution of the 1998 and 1999 ) Docket No. 2001-8 CARP CD 98-99  
Cable Royalty Funds )

PROGRAM SUPPLIERS' REPLY PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PHASE I ISSUES

Michael E. Tucci  
Gregory O. Olaniran  
Robert L. Eskay, Jr.  
Sarah K. Johnson  
Stinson Morrison Hecker LLP  
1150 18<sup>th</sup> Street, NW, Suite 800  
Washington, DC 20036  
(202) 785-9100

Attorneys for  
PROGRAM SUPPLIERS

September 5, 2003

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## GLOSSARY

1990-92 tr.:	Transcript of the 1990-92 CARP Proceedings
Bortz Study:	Cable Operator Valuation of Distant Signal Non-Network Programming, JSC Exhibit __
Canadians:	Canadian Claimants
CARP (or Panel):	Copyright Arbitration Royalty Panel
CDC:	Cable Data Corporation
CRT:	Copyright Royalty Tribunal
Claimants:	Copyright Owners Participating in the 1990-92 Copyright Royalty Distribution Proceeding
Devotionals:	Devotional Claimants
Ex. __:	Direct Testimony Exhibit
Ex. __-X:	Direct Case Cross-Examination Exhibit
Ex. __-R:	Rebuttal Testimony Exhibit
Ex. __-RX:	Cross-Examination Rebuttal Exhibit
Fee(s) gen:	Compulsory Royalty Fees Generated
H.Rep. No.:	House Report Number
Librarian:	Librarian of Congress
JSC:	Joint Sports Claimants (also referred to as Sports)
Music:	Music Claimants
NAB:	National Association of Broadcasters (also referred to as "Local" or "Commercial TV Claimants")
NAB Regression Model:	Regression model presented by NAB witness, Dr. Gregory L. Rosston

Nielsen:	Nielsen Media Research
Nielsen Viewing Studies:	Distant Viewing Report for 1998 and 1999 prepared by Nielsen
Panel	Copyright Arbitration Royalty Panel
Proposed Findings	Proposed Findings of Fact and Conclusions of Law
PTV:	Public Television Claimants
PS:	Program Suppliers
Syndex:	Syndicated Exclusivity
Tr.:	Transcript of 1998-99 CARP Proceeding
Tribunal:	Copyright Royalty Tribunal
Written direct:	Written testimony submitted by witness in claimant's direct case
Written rebuttal:	Written testimony submitted by witness in claimant's rebuttal case

**PROGRAM SUPPLIERS' REPLY PROPOSED FINDINGS OF FACTS  
AND CONCLUSIONS OF LAW ON PHASE I ISSUES**

In accordance with the procedures established by the Panel's Order dated July 18, 2003, Program Suppliers hereby respectfully submit their Reply Proposed Findings of Fact and Conclusions of Law. This Reply responds to the Proposed Findings of Fact and Conclusions of Law advanced by the National Association of Broadcasters on behalf of the Commercial Television Claimants, the Public Television Claimants, the Music Claimants and the Canadian Claimants.<sup>1</sup>

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<sup>1</sup> As with their previous filing, Program Suppliers do not reply to the Proposed Findings of Fact and Conclusions of Law advanced by JSC nor do they address the appropriate award to JSC.



## I. INTRODUCTION.

In determining the appropriate marketplace value and corresponding shares to be awarded to each claimant group, the CARP should ground its ultimate determination on empirical evidence of the actual behavior of cable subscribers and cable system operators. Program Suppliers' evidence of actual behavior is by far the most compelling, relevant, and persuasive showing in this proceeding to aid the Panel in discharging its mandate. Giving substantial weight to any other methodology would interject uncertainty into the distribution process and would result in evaluating distant signal programming on a totally different basis from how programs are valued in the rest of the television industry, all without adequate justification.

The legislative history to the Copyright Act and prior royalty distribution rulings acknowledge that royalty awards are to be based on a simulated market valuation for the programming categories, not on the basis of a construct with little or no connection to a real world marketplace. 17 U.S.C. § 111; H. Rep. No. 1476, 94<sup>th</sup> Cong. 2d. Sess. 90 (1976); 1989 Final Determination, 57 Fed. Reg. 1528 (April 27, 1992). That simulated marketplace looks like the cable network marketplace. 1990-92 CARP Report at 24. Although the cable network marketplace did not exist as a mature marketplace at the time of the last litigated distribution proceeding, between 1990 and 1999, it grew and matured, and thus offers this Panel a well-developed, analogous marketplace on which to rely in basing the royalty shares in this proceeding.

The evidence from the cable network marketplace shows that cable system operators value cable networks on the basis of their popularity with viewers; for example, the more viewed networks command greater license fees than the less viewed ones. PS Proposed Findings at ¶

287. This evidence shows cable operators value the channels that they carry on the basis of viewing levels. The Nielsen Viewing Studies therefore provide the foundation for marketplace value assessment of distant signal programming that should be adopted and given the most weight by this Panel.

To give greater weight to any competing analysis would be to turn a blind eye to the real world because those alternatives are not based on actual behavior, involve far less precision than the Nielsen Viewing Studies results, and interject subjective opinions into the process. The presence of an analogous marketplace with actual evidence of cable operator behavior precludes the need to engage in guessing games or seek subjective opinions about how values for distant signal programming would be determined in a free market. Program Suppliers have presented substantial and comprehensive empirical evidence of the decisions made in the cable network market on which to base distribution awards.

**A. Nielsen Ratings Are The Foundation Of The Television Business.**

Using viewing results as the foundation for the marketplace value determination is totally consistent with how the rest of the cable and television industry operates. The entire television industry, including the cable industry, uses Nielsen ratings as the basis to determine the market value of programming. PS Proposed Findings at p. 164. Billions of dollars are spent for programming on the basis of how many people view the programming. The market value of the programming is synonymous with the size and composition of the audience viewing the program as reported by Nielsen. PS Proposed Findings at ¶ 176 (Carey), 570 (Thompson). The pervasive influence of Nielsen viewing data throughout the television industry makes it recognized as the "currency" of the marketplace. PS Proposed Findings at p. 164.

Parties attempt to downplay the significance of Nielsen ratings data by arguing that cable operators' interest in "attracting and retaining" subscribers cannot be measured by or correlated

with Nielsen viewing data. Instead, they claim, cable operators value distant signals and other programming offered to subscribers on some other basis. These claims achieved some level of acceptance with prior CRTS and CARPs using Nielsen reported viewing results as a "starting point." For example, the 1979 CRT decision stated:

We regard the [Nielsen] Report as the single most important piece of evidence in this record...It is a useful "starting point" for the application of criteria to the record evidence, but we have not accepted it as a talisman which fully reveals and determines the application of the criteria. A major reason for the Tribunal being unable to accord the Nielsen "hard numbers" the weight urged upon us by MPAA is that we share the views advanced by certain other claimants, notably Joint Sports and NAB, that cable operators are interested in selling subscription and that viewership is of limited relevance to cable operators.

47 Fed. Reg. 9878, 9892 (March 8, 1982); *see also* 1990-92 CARP Report at 42, 44 (accepting the Nielsen viewing studies as an accurate representation of viewer conduct, but refusing to use Nielsen viewing as the final word on value).

The evidence in this proceeding compels that the Nielsen Viewing Studies be given greater weight in determining value. Not only have the methodological criticisms of earlier Nielsen studies been addressed, but also compelling empirical evidence shows that cable networks and operators rely heavily on viewing data to value programming. This evidence of actual behavior demonstrates that Nielsen ratings in the analogous cable network marketplace are, as they are throughout the television industry, the one constant used to assess marketplace value of programming.

#### **B. The Distant Signal Marketplace.**

Two categories of argument have been advanced as to why Nielsen data are not the appropriate methodology to determine marketplace value. First, viewing data are claimed to be irrelevant to the cable system operator because subscriptions are the goal, and viewership and subscriptions are not equal. *See* 1990-92 CARP Report at 83. Second, methodological

criticisms of Nielsen have been raised; for example, alleging the data collection is imperfect or certain information (demographics) was not reported. 1990-92 CARP Report at 35-38, 40-42. These arguments have been repeated in the Proposed Findings by PTV and NAB to varying degrees and are addressed below.

*1. Cable Operators And Ratings.*

If the assertions that cable operators are unconcerned with ratings were true in the real world, there should be no discernible relationship between how cable operators allocate their funds for cable network license fees and the viewing levels for those cable networks. Yet, there is a direct, discernible correlation between the two, with cable operators systematically paying more for higher-rated cable networks than for lower-rated networks. PS Proposed Findings at ¶ 287. This evidence of actual cable operator behavior debunks the argument that viewing data are irrelevant to cable operators. *See e.g.* 1990-92 CARP Report at 44. The uncontroverted evidence of actual behavior establishes that cable operators value programming in much the same way as do broadcasters and advertisers. Higher rated programming commands higher license fees, which is directly indicative of a higher marketplace value. The converse is true of lower-rated programming. *See* PS Proposed Findings at ¶ 331. Of course, this conclusion makes perfect sense. No evidence has been presented that shows cable operators employ different valuation tools from the rest of the industry, or don't care what programs their subscribers watch. Operators do care and it makes sense for cable operators to care. A cable subscriber that is offered nothing that he or she enjoys viewing won't be a subscriber for very long. *See* PS Proposed Findings at ¶¶ 169 (Carey), 617, 619-20 (Thompson).

This counterintuitive construct is a red herring used to substitute other metrics in place of Nielsen viewing results for use by the Panel. But no evidence shows those other metrics are used at all, much less as extensively as Nielsen data, by operators to make programming decisions. It

is clear that if cable operators paid for distant signals the way they pay for cable networks, the value of distant signal programming would be commensurate with the viewing achieved by each programming type, just as it is true in the cable network and broadcast marketplace. Nielsen viewing therefore should be used as the baseline marketplace value of distant signal programming.<sup>2</sup>

## *2. The Nielsen Viewing Data.*

In past proceedings, criticisms of Nielsen viewing results have centered around data collection mechanisms employed by Nielsen, and the selection of the sample stations. Despite these criticisms, prior CRT and CARP decisions have generally accepted the Nielsen results as an accurate indication of viewer behavior. See e.g. 1990-92 CARP Report at 44. In this proceeding, no testimony casts doubt on the accuracy or reliability of the distant viewing studies conducted by Nielsen. Nielsen's methodology is therefore unchallenged, and the results must be accepted as a valid representation of the distant signal viewing.

## *3. Demographics.*

Some parties have argued that past Nielsen reports about household viewing did not provide the demographic information on which many programming decisions are based. Lindstrom 1990-92 tr. 8298-99. In response, Nielsen results presented in this proceeding include both household and demographic data. Furthermore, Nielsen presented the viewing data in quintiles which measure viewing from the heaviest to the lightest viewers in blocks of twenty

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<sup>2</sup> In a bizarre comment, NAB suggests that Dr. Gruen somehow abandons Nielsen viewing data as the appropriate measure of marketplace value and as support cites to Dr. Gruen's written direct at p. 38. See NAB Proposed Findings at ¶ 85. Dr. Gruen does nothing of the sort, but simply further analyzes the Nielsen results based on demographics and the relationship between viewing and availability. To suggest that by engaging in a further level of analysis that Dr. Gruen has abandoned Nielsen viewing data is patently absurd. Additionally, NAB further misconstrues Dr. Gruen's testimony and apparently attempts to mislead the Panel by stating that Dr. Gruen "would simply allocate PTV its 1990-1992 award" of 5.5%. NAB Proposed Findings at ¶ 85, n. 249. Dr. Gruen clearly states in his testimony that "We see no reason why PBS programming should receive higher copyright payments than PBS's specific contribution to the pool," Gruen Written Direct at 34, and "we believe the PBS share should be

percent. PS Proposed Findings at ¶¶ 238, 248. This additional information was presented in response to earlier charges that Program Suppliers' viewing (and not other categories) was overly influenced by "heavy watchers" of television. As the quintile data shows, Program Suppliers' shares are not skewed to any particular use pattern. See e.g. PS Exs. 20 and 22. If anything, NAB's and PTV's shares are inflated by heavy viewers. *Id.*

The Nielsen viewing results were presented by demographics, or age group, which is the common method utilized in the television industry for refining and weighting viewing results by subscribers in different age groups. See PS Proposed Findings at ¶ 137. The television and advertising industries value viewing by those in the 18-49 age group more than viewing by other age groups because this group is considered most open to new products or to changing their buying patterns. Because of this, valuation of television programming is weighted more heavily by 18-49 viewing. PS Proposed Findings at ¶¶ 150-51, 154. To reflect this market reality, Nielsen distant viewing data were reported by age groups, making it possible to separate the 18-49 viewing in the evidence presented in this proceeding for the first time. See PS Exs. 20 and 22.

However, looking at 18-49 viewing for purposes of this proceeding would not be important unless cable operators, like advertisers and others in the television business, are more interested in 18-49 year olds than other age groups. Program Suppliers presented detailed evidence as to why cable operators were similarly interested. That evidence showed that cable operators in 1998 and 1999 were particularly interested in reaching the 18-49 audience to market ancillary services like internet connections, telephony and pay-per-view services and was corroborated by NAB witness, Dr. Ducey who offered the Beta Research Study. That study

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lower in 1998-1999 than it was in 1990-1992." *Id.* at 40. Dr. Gruen used the 5.5% awarded PTV in 1990-92 as an "upper bound" and for illustrative purposes in developing the shares for other parties. *Id.*

repeatedly showed that 18-49 respondents were the largest group interested in new channels and ancillary services. PS Proposed Findings at ¶¶ 764-772. NAB now attempts to downplay the importance of 18-49 year olds by citing to evidence that ancillary services made up only 3% of cable systems revenue in the relevant timeframe. NAB Proposed Findings at 69 (¶ 90).

As Dr. Gruen explained in his direct testimony, in 1998 and 1999 cable operators were under competitive assault from Direct Broadcast Satellite ("DBS"). PS Proposed Findings at ¶¶ 279, 349-52. As a result, cable operators spent billions upgrading their systems to be able to offer these ancillary services to make their systems more competitive. *Id.* Clearly, such an investment would not have been justified unless the cable operators believed that there was a potential return in the future. That those ancillary services were in their infancy in 1998-1999 does not diminish their importance of reaching out to potential, or keeping current, subscribers. The subscriber research shows that the most likely group to sign up for those ancillary services were in the 18-49 age bracket, which is also the largest single group of cable subscribers. PS Proposed Findings at ¶ 364-72. This shows why operators were interested in the 18-49 demographic and would value programs watched by it more than other groups. Thus, Nielsen viewing of this group should be given the most weight for purposes of determining the marketplace value of the programming for each claimant category.

This testimony undermines PTV's claim that the only evidence advanced by Program Suppliers in support of focusing on the 18-49 age group was Dr. Gruen's comparison of advertising spending and cable operator spending contained at pp. 22-25 of his written direct testimony. *See* PTV Proposed Findings at ¶ 479. *See* NAB Proposed Findings at ¶ 92. (same). Additionally, PTV goes so far as to make the incredible assertion that "there is no statistical basis for concluding that in selecting distant signals cable operators place the greatest value on 18-49

year olds," purportedly relying on the testimony of Dr. Fairley. *Id.* As noted above, and apart from Dr. Gruen's advertising analysis, cable operators were keenly interested in appealing to 18-49 year olds. Program Suppliers demonstrated in their Proposed Findings at pp. 162 n.3, 163 n.4, that the differential, calculated by Dr. Gruen and criticized by Dr. Fairley, is small because the difference between 18-49 viewing and household viewing is small. In any event, Dr. Fairley's criticism of Dr. Gruen's analysis does not establish that cable operators do not value 18-49 year olds more highly than other age groups. Finally, Dr. Fairley's views as a statistician do not outweigh the consistent statements of many witnesses with lifelong experience in the television industry that 18-49 viewing should be given greater weight.

PTV suggests that using the 18-49 demographic is a departure from the CARP "precedent" of using household viewing data. PTV Proposed Findings at ¶ 290. However, in previous proceedings, when only household data was reported, PTV claimed that demographic data should have been presented. Lindstrom 1990-92 tr. 8298-99. Using demographic information simply represents an enhancement of the Nielsen household viewing data, which were also presented, and is wholly consistent with the practices in the industry. *See e.g.*, PS Proposed Findings at ¶¶ 32, 36 (Winkelman), 136, 137 (Green), 150, 159 (Carey), 281, 293 (Gruen), 571 (Thompson), 737, 751, 759 (Ducey), 796 (Wilson), 823-826 (Fuller), 990-991 (Walden).

Despite PTV's and NAB's protestations to the contrary, focusing on 18-49 year olds does not ignore or eliminate other age groups. Placing greater emphasis on the viewing by 18-49 year olds is a method of weighting the Nielsen viewing to reflect real world experience. Contrary to NAB's and PTV's attempt to show that focusing on 18-49 viewing somehow "ignores" or deems irrelevant those not in the favored demographic (in strikingly similar language), the simple fact is



that other groups are given less weight, not ignored, because they are universally valued lower. While it is true that a cable operator wants subscribers from all age groups, this weighting recognizes that, all other things being equal, the cable operator has a valid economic reason for preferring 18-49 subscribers over other age groups. The 18-49 subscriber represents a greater potential income stream. Therefore, there is a legitimate economic reason to skew programming in an effort to attract more 18-49 year olds, and to value distant signal programming on that basis.

Program Suppliers demonstrated that cable operators were more interested in attracting and retaining 18-49 year old subscribers in 1998 and 1999. Therefore, Nielsen Viewing Studies results for that age group are objective, empirical evidence upon which this Panel should place the greatest emphasis in determining the appropriate awards for the parties.

### **C. Evidence Outside The Distant Signal Market Elicited In This Proceeding.**

The foregoing evidence and the conclusions derived therefrom should not be surprising. As noted, the entire television industry is valued on the basis of ratings provided by Nielsen Media Research. Billions are spent on the basis of audience levels as refined by demographics. See PS Proposed Findings at ¶¶ 151, 155. Similarly, programming is bought, sold and valued on the basis of the audience that will be achieved and the demographic make-up of that audience. Popular programming commands more than less popular programming. Popular syndicated series are watched by most people and have the best demographics and command millions per episode in syndication. See PS Proposed Findings at ¶¶ 304-305, 420-22. In contrast, millions of dollars per episode are not paid in the open market to syndicate PTV's *Barney*, the local news or station produced high school sports. PTV Proposed Findings at ¶ 43.

The real world television marketplace uses viewership of programs as the "coin of the realm" or the "currency of the industry" by which relative values of different programs can be

measured. PS Proposed Findings at p. 164. If a distant signal marketplace existed, it would operate precisely the same way. Nothing offered by NAB or PTV persuasively requires a different conclusion.

#### **D. Nielsen Viewing Adjusted To Reflect Viewer Intensity.**

Finally, Nielsen's 18-49 viewing data can and should be adjusted to reflect the fact that some programming is more intensely viewed than other programming. For example, Sports programming is viewed more heavily compared to its limited broadcast time. Program Suppliers offered an objective, empirical method for accounting for such intensity of interest that does not involve subjective "feelings" or "viewer preferences" or other imprecise indicia in an effort to provide the Panel a mechanism to adjust viewing shares to reflect this factor.

It should be recognized at the outset that the avidity adjustments proposed by Dr. Gruen (see PS Proposed Findings at ¶ 429-430) do not serve to increase Program Suppliers' share. To the contrary, Program Suppliers' Nielsen share of 18-49 viewing in 1998 is 71.3% and is 67.9% in 1999. After Dr. Gruen adjusts the share based on his avidity calculation, Program Suppliers' share goes down to 67% in both years. JSC is the principal beneficiary of the avidity adjustment and the adjustment serves to lower all shares except Sports.

Both PTV and NAB claim that Dr. Gruen's methodology and calculations are flawed for the same basic reasons. The complaints concerning Dr. Gruen's use of unweighted minutes were rectified by calculating the ratio using NAB's weighted program minutes. That calculation actually raises Program Suppliers' share for 1998 from 71.3% to 72.6% and raises it for 1999 from 67.9% to 73.6%. See PS Proposed Findings at p. 172-74. Accordingly, using NAB weighted data further corroborates and supports the relationship shown by Dr. Gruen, and addresses the concern expressed by NAB and PTV, and accepted by the Tribunal in the 1989 royalty distribution proceeding, that the viewing to time ratio could be more a function of access

to the signal than the intensity of viewership. *See* 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15289 (April 27, 1992). The use of weighted minutes fully eliminates that claim.<sup>3</sup>

NAB apparently realized that using its weighted program minutes would corroborate Dr. Gruen's findings and sought to introduce an alternative approach. Ducey tr. at 8944-45 and NAB Ex. 18-R. However, that analysis and the exhibits underlying it could not be explained by Dr. Ducey because he had no role in its preparation. *Id.* As a result, the Panel struck NAB exhibit 18-R. Ducey tr. 8954-55. Despite the Panel's ruling, NAB continues to rely on Dr. Ducey's testimony and exhibits which purported to show a more limited effect for more intense viewer avidity. *See* NAB Proposed Findings at ¶ 98. That argument should be afforded no weight because the analysis underlying it has been stricken.

NAB and PTV also suggest that the Panel attempt to quantify and give weight to such impossible concepts such as the viewer's "connection to the program." PTV Proposed Findings at ¶ 431. In support of its position, NAB seeks to rely on 1983 survey evidence. NAB Proposed Findings at ¶ 95. Obviously, twenty year old survey evidence has little relevance in this proceeding. Moreover, it was afforded little, if any, weight when first presented. 1990-92 CARP Report at 112. In addition, such "connections" or feelings" are related to individual programs, rather than to the categories of programming that are before this Panel. Even Dr. Ducey, the usual sponsor of the survey evidence "absolutely" discounts such evidence. Ducey tr. 8938, "[t]here is a big difference between expressing an attitude and actually doing something about it." While each claimant category can legitimately point to certain viewers who connect

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<sup>3</sup> It is at the very least interesting to note that despite NAB and PTV protestations to the effect that unweighted minutes would give Program Suppliers an unfair advantage, the opposite is actually true.

with individual programs, no means was offered to connect such individualized feelings to claimant categories as a whole.

Simply put, Dr. Gruen's avidity analysis avoids the infirmities of the PTV and NAB touchy-feely approaches. Dr. Gruen measures a mathematical relationship between program viewing and availability to show that some programming has larger relative viewing than others. More intensely viewed programming is more valuable and should be accorded greater weight in setting marketplace value in this proceeding. Conversely, less intensely viewed programming reflects a lesser marketplace value.

Rather than an attempt to inflate Program Suppliers' shares, the avidity adjustment takes raw viewing and time data as one measure of the real world consequences of the broadcasting of popular sports events or widely popular syndicated series and movies and gives effect to the fact that the marketplace value of such intensely viewed programming exceeds the Nielsen Viewing Studies results.

## **II. PTV'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

### **A. Introduction.**

In an attempt to distract the Panel from focusing on evidence that demonstrates the limited value of a PTV signal in a simulated free distant signal marketplace, PTV has embraced both a "smoke and mirrors" approach and a "red-herring" approach. The "smoke and mirrors" is simply PTV's willingness to embrace whatever theory (or theories) seems to offer the best chance of maximizing PTV's award. Unlike Program Suppliers, who have steadfastly maintained the primacy of their Nielsen-based evidence from proceeding to proceeding, or the Joint Sports Claimants, who have shown the same consistency with the Bortz Study, PTV seemingly embraces and abandons theories at the drop of a hat.

In December of 2002, before PTV had seen the results, it was "clear" to PTV "that the Nielsen study does not address the criteria of relevance to the Panel," Fuller written direct, 20, and it was just as clear to PTV that the Bortz survey was "highly valuable in determining market value." Johnson written direct, 27. However, after seeing the results of the two studies, PTV, for the first time in the history of these proceedings, maintains that ratings are "an important indicia of valuation," PTV Proposed Findings at ¶ 474, while disparaging the Bortz results, which "cannot be taken at face value." Johnson written rebuttal, 22.

PTV's case is simply a moving target that seeks to overcome the simple fact that, by its own admission, PTV programming is not designed to succeed in a free market. As this Panel is charged with simulating free market results, PTV's inability to succeed in a commercial free market must be considered when determining PTV's appropriate award.

PTV's "red herring" is its insistence that the "seismic shift" in the distant signal universe since 1992 resulted entirely from WTBS' conversion.<sup>4</sup> Yet, Dr. Hazlett and others identified numerous possible causes for the reduced size of the royalty pool independent of the WTBS departure. But, more importantly, whatever reduction in royalties was caused by the TBS conversion, none of it was (or is) PTV royalties because no PTV programs were carried on WTBS. Notwithstanding that, PTV's 1990-92 award included substantial amounts based on royalties related to WTBS distant carriage because PTV's award was greater than the amount paid by cable operators for PTV station carriage. This practice should not be continued here, and there should be a significant downward adjustment to PTV's award.

Beyond these general points, several specific issues are addressed in detail below.

**B. The Doctrine Of Judicial Estoppel Requires The Panel To Adjust PTV's Award To Reflect Its Nielsen Epiphany.**

Obviously, an increase in PTV's relative share of viewing compared to previous proceedings led to PTV's decision to embrace Nielsen results as a measure of value in this proceeding. Indeed, in Mr. Fuller's direct testimony filed in December 2002, prior to PTV's knowledge of its Nielsen results, he completely disavowed Nielsen, consistent with PTV's position in all prior CARP proceedings. Fuller written direct, 25 ("In sum, the factors most relevant to this proceeding are not measured by the Nielsen study"). Simply put, PTV's position is that any number, good for PTV, indicates program value. Numbers bad for PTV, however, do not indicate program value.

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<sup>4</sup> Additionally, PTV and NAB play a little three-card monte in advocating that Program Suppliers share should be reduced because of the conversion of WTBS to a cable network. While both advocate receiving close to their Nielsen Viewing Studies shares, both try to convince the Panel that the same Nielsen household viewing results should be the basis for *decreasing* Program Suppliers' share by between 25% to 45%. NAB Proposed Findings at 157-163. Even stranger, both essentially advocated that a similar percentage reduction was warranted in the 1990-92 Program Suppliers' share. PTV and NAB apparently overlook the fact that Program Suppliers 1990-1992 award was already 30% less than the viewing share reported by Nielsen. Essentially they urge that the 1990-1992 Program Suppliers' Panel award that disregarded Nielsen must now be adjusted to reflect a reduction reported by Nielsen.

While Program Suppliers are encouraged by PTV's acceptance of Nielsen, the Panel should not allow PTV to embrace Nielsen only when PTV's numbers are high, but should take steps to not only lock them into their current position, but also to redress the inequities of previous rulings from which PTV benefited by championing a contrary view. Of course, if the Nielsen data were a good indicator in 1990-1992, PTV was grossly overcompensated, having received an approximate award of 5.75% when Nielsen viewing results reported PTV viewing of approximately 2-4%.<sup>5</sup> 1990-92 CARP Report at 121, 124.

The inequities of such overcompensation demand adjustment, and the Panel is empowered to do so. 1990-92 CARP Report at 23 ("[I]f a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.").<sup>6</sup> Moreover, the doctrine of judicial estoppel provides the Panel with a sound basis for refusing to let PTV benefit from its positional switch. In *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 121 S.Ct. 1808, 1814-15 (2001), the U.S. Supreme Court outlined the doctrine, which essentially prevents a party from reaping the benefit of taking a position inconsistent with a previous position on which the party prevailed:

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895); ... see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be

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<sup>5</sup> Conversely, this demonstrates that Program Suppliers were grossly under compensated.

<sup>6</sup> Several possible methods are at the Panel's disposal. One method would be to simply reduce PTV's award in this proceeding by the amount of overcompensation in the 1990-92 proceeding. Another would be to deny PTV the benefit of the Nielsen results for this proceeding.

allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (C.A.6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (C.A.5 1993). See *In re Cassidy*, 892 F.2d 637, 641 (C.A.7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (C.A.4 1982) (judicial estoppel "protect [s] the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (C.A.3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts' " (quoting *Stretch v. Watson*, 6 N.J.Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 626 F.2d 933, 938 (C.A.D.C.1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (C.A.9 1990) (internal quotation marks and citation omitted).

Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F.2d, at 1166; accord, *Lowery v. Stovall*, 92 F.3d 219, 223 (C.A.4 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (C.A.1 1987). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (C.A.7 1999); *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (C.A.5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (C.A.8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (C.A.2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d, at 599. ... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *Davis*, 156 U.S., at 689, 15 S.Ct. 555; *Philadelphia, W., & B.R. Co. v. Howard*, 13 How. 307, 335-337, 14 L.Ed. 157 (1851); *Scarano*, 203 F.2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction ... as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782.

Here, given the disparity between the Nielsen results in the 1990-1992 proceeding and PTV's award, there is no question that the CARP accepted PTV's position. There is also no question that here PTV has taken a position wholly inconsistent with its approach in 1990-1992 and even



the direct testimony of Mr. Fuller filed in this case. Accordingly, the doctrine of judicial estoppel should be applied to PTV.

**C. Because The Commercial Television Market Will Not Support PTV Programming, And There Is No Evidence In The Record That A Simulated Market Would Support PTV Programming, PTV's "Parity" Assumptions Are Baseless.**

PTV claims that "[i]t is implausible that there would be that much of a difference in relative value between the carriage of a PTV signal and a commercial signal ...." PTV Proposed Findings at ¶ 241. This counterintuitive assertion--that PTV programming is as valuable as commercial programming--falls well short of passing the "straight face test."

To begin with, the only support (such as it is) for this assertion comes from PBS employee John Fuller--hardly an unbiased reporter of fact. Against this "support," objective marketplace facts suggest otherwise. First, PBS's original (and continuing) charge was to provide programming that the marketplace would probably not support and that has significantly lower commercial value than the other programming choices. PS Proposed Findings at ¶ 627. PTV's mission, to "educate and enlighten" the public, and its motto "If we don't do it, who will?" captures the situation well: commercial broadcasters will not "do it" because PTV programming has not and would not succeed in a free market. PTV Proposed Findings at ¶¶ 509, 382 (noting that PTV's motto "expresses the notion that PTV presents educational and informative programming that cannot survive commercially"). With respect to the crown jewel of the PTV programming portfolio -- children's television shows -- PTV is explicit: "[C]ommercial television will not support the syndication of educational children's television of the type found on Public Television." PTV Proposed Findings at ¶ 43 (citation omitted).

Other market facts showing the lack of value for PTV, as more fully explored in Program Suppliers' Proposed Findings, include the following:

- Only 23% of cable systems carry PTV distant signals, and these systems serve only about 10% of the cable subscribers nationwide; thus, cable operators representing nearly 90% of cable subscribers choose not to carry PTV on a distant basis. In stark contrast, it is the virtually unanimous choice of cable systems to carry distant signals with syndicated series and movies. PS Proposed Findings at p. 215 (citations omitted).
- On June 27, 1991, Henry P. Becton, Jr., President and General Manager of WGBH Educational Foundation, the nation's largest public broadcasting outlet on behalf of PTV, stated the following: "As commercial enterprises, cable systems lack the incentives to carry programming that does not attract sufficient dollars or audience. Public television, in fulfilling its mandate to serve those audiences not served by commercial enterprises, carries precisely the programming that cable systems find economically unattractive." PS Proposed Findings at p. 216-217.
- While Congress established a DSE value for independents of 1.0, it set PTV's DSE at .25. This means that Congress believed independent signals were four times as valuable as PTV signals to cable operators. PS Proposed Findings at p. 220.
- WTBS, the most widely carried distant signal, upon conversion to a cable network, commands 3 to 4 times the amount in license fees than were paid in royalties for its carriage as a distant signal. PS Proposed Findings at p. 220.

These real world facts undermine any claim that PTV programming, in a simulated distant signal marketplace freed of the compulsory license, is equal in value to commercially viable programming.

**D. The Fierce Competition Faced By PTV From "Look-alike" Channels In 1998-1999 Is A Changed Circumstance Justifying A Reduction In PTV's Award.**

Although Program Suppliers presented evidence to the 1990-92 CARP regarding competition to PTV from "look-alike" cable networks, the Panel nonetheless determined that: "[T]he increased entry of 'look-alike' cable networks, rather than eroding PTV's share of the distant signal marketplace, with at least equal likelihood reflects perception of a valuable niche market established by PTV with potential for yet further expansion." 1990-92 CARP Report at

123. This perception has been proven inaccurate over time, as the value of look-alikes increases, while PTV does not.

PTV acknowledges in paragraph 443 of its Proposed Findings the "increasing competition from specialty channels" that it faced in 1998 and 1999. Increased competition from cable network look-alikes, PS Proposed Findings at ¶ 810, 864, has contributed to PBS audience erosion. *Id.* at ¶ 811. The look-alike channels, rather than PTV, have exploited the "valuable niche market" identified by the CARP in 1990-92. For example, between 1990 and 2000 there was a 23% decline in PBS' overall Nielsen rating. PS Proposed Findings at ¶ 817. Moreover, while PBS ratings were going down, cable network look-alike ratings were going up. PS Proposed Findings at ¶ 865. This was occurring despite the fact that it costs a cable operator much more to carry a PTV look-alike cable network, than it does to carry PTV as a distant signal. PS Proposed Findings at ¶ 866.

During 1998 and 1999, the inroads caused by look-alike competition was one of the major concerns at PBS. *See* PS Proposed Findings at ¶ 812, 816. A passage from the 1998-99 PBS Communications Plan summarized the situation as follows:

One of our greatest competitive challenges is in the world of perception and branding. No other broadcast service has as much competition from cable and satellite. As a result, member stations are no longer competing on a local station vs. local station basis. Rather, they are competing with nationally branded, highly recognized networks that use national paid media, national editorial and national on-air and cross-channel promotion to build their brands. Further, these networks have the added advantage of promoting channels that are clearly defined by their names (e.g., The History Channel, The Learning Channel, Discovery).

As a result, program genres that were formerly solely "owned" by us in the minds of the public are now also associated with our competition. And viewers have begun to misidentify where they are watching our programs, at times attributing them to competing services.

PS 98-99 Ex. 24-X, at 1.

Not only did programming from cable networks pose a threat, in 1998-99 PBS realized it could "no longer assume exclusivity of [its] signature programs," PS 98-99 Ex. 24-X, at 1, and witnessed several PTV "defections." For example, *The Magic School Bus* left PBS and went to Fox, while a look-alike channel aired British dramas that had previously appeared on *Mystery*. PS Proposed Findings at ¶ 813-14.

Thus, in 1998-1999, unlike 1990-92, PTV was fighting not for domination of a niche, but for *relevance* in that niche. See PS 98-99 Ex. 24-X, at 1 (noting that "[t]he good news is that we continue to be *relevant* ....")(emphasis added). The assumption of the Panel in 1990-92 that PTV was poised to exploit a valuable market niche has been shown to be wrong. This is a changed circumstance that requires a downward adjustment in PTV's 1990-92 share.

**E. PTV's Assertions That Avidity (As Defined By PTV) For PTV Programs Is Important To Cable Operators Has No Basis In Fact Or Reality.**

In paragraphs 106-16 of its Proposed Findings, PTV essentially argues that people who watch PTV shows really like them, and cable operators care about this. Again, the only evidence in support of this claim comes from PBS employee Mr. Fuller, and because of his self-interest should be given very little weight. Even assuming *arguendo* this proposition had some validity, it does not show that additional value ought to flow to PTV.

Further, PTV's argument supports inordinately valuing the viewing preferences of one very interested person over the viewing preferences of many interested people. That is, if PTV put together a real-time documentary on glacier melting, and one person really liked it, that person's preference would be counted more than the millions more who merely like syndicated *Seinfeld* episodes. In other words, PTV theorizes that 5 *really happy* subscribers are more important to cable operators than 100 just plain *happy* subscribers. Nothing in evidence supports that proposition. One would expect economically rational cable operators to seek programming

that would gather the largest group that was just happy enough to keep paying their monthly cable bills.

**F. PTV's Attempts To Distance Itself From The Market Forces That Drive Commercial Television Are Unpersuasive.**

PTV has long championed itself as the lone commercial-free voice in the distant signal landscape, and has benefited from the "halo-effect" that is part and parcel to this claim. In fact, one of the studies offered by PTV essentially identified the lack of commercialism, rather than program quality or diversity, as the most important PBS asset, and noted that excessive moves towards commercialism would risk turning public television into simply another competing cable network. PS Proposed Findings at ¶ 860. Because the record in this proceeding contains substantial evidence of PTV's commercialism, e.g., PS Proposed Findings at ¶¶ 625, 805, 807, 825-27, 839, 846-49, any halo that still exists is substantially tarnished.

*1. PTV's Underwriting Model Is Virtually Identical To Commercial Broadcasting's Advertising Model.*

In its findings at ¶¶ 28-35 PTV describes the "Business of Over-the-Air Commercial Broadcasters," but fails to acknowledge that in recent years PTV has developed many of the same characteristics. As with commercial broadcasting advertisers, the majority of PBS underwriters are for-profit corporations. PS Proposed Findings at ¶ 804. In the mid-1980s, PBS shifted its focus in approaching potential underwriters from extolling societal benefits to assuring benefits to the underwriter. PS Proposed Findings at ¶ 807. Thus, just as in the commercial world, an underwriter's decision to sponsor a PBS program requires some benefit deriving from the sponsorship. PS Proposed Findings at ¶ 805.

Unsurprisingly, underwriters, like commercial broadcasters, are interested in how many people, and what type of people, are watching the shows they sponsor. PS Proposed Findings at ¶ 806. Thus, just as a manufacturer of fishing lures might advertise on *Babe Winkelman's Good*

*Fishing*, companies will pick specific PBS programs to underwrite because the content of the program draws a particular audience, such as a cookware maker underwriting a cooking show. PS Proposed Findings at ¶ 839. Similarly, children's shows are often underwritten by companies selling products that appeal to kids. PS Proposed Findings at ¶ 840.

Because viewing statistics, including demographic breakdowns, are important to PBS underwriters, the PBS research group, according to Mr. Fuller, regularly provides them with comprehensive reports containing information about ratings and demographics in conjunction with staff efforts to secure underwriting. PS Proposed Findings at ¶¶ 825, 826. The PBS research group also does follow-up work with particular underwriters to see how audiences are responding to particular PBS programs. PS Proposed Findings at ¶ 827.

## *2. PTV Is Not Commercial-Free.*

In its Proposed Findings, PTV recites the opinion of John Wilson that "[u]nderwriting announcements are not advertising; they simply identify the underwriters." PTV Proposed Findings at ¶ 348. Far from "simple identification," these spots, as Professor Thompson makes clear, along with the pledge drives, auctions, and more aggressive sponsorship spots, have turned PBS away from a commercial-free mode. PS Proposed Findings at ¶ 625. As a practical matter, the difference between "commercials" on broadcast stations and "underwriting spots" on PBS is largely definitional, with PBS choosing to place more restrictions on the content of the spots.

In maintaining its "commercial free" facade, PTV is attempting to stake a claim to the high ground, particularly as it relates to advertisements targeted at children. *See* PTV Proposed Findings at ¶ 371. Yet, as the cross-examination of Mr. Fuller showed, PTV's hands are not so clean. During the 1998-1999 period, there was a big push by PBS to promote their websites for children's programming as being another place that children could go and get further information

for the particular show. PS Proposed Findings at ¶ 845. Of course, once there, children were presented with active hyper-links to various purveyors of children's products. For example:

- On the *Sesame Street* home page, which is linked to the PBS kids home page, the logos for AOL, Spaghetti-Os, and Quaker Oatmeal are hyper-links, which when clicked, pull up the home pages of each respective sponsor. PS Proposed Findings at ¶¶ 846-847.
- On the *Arthur* home page, which is linked to the PBS kids home page, the logos for Juicy Juice, Alphabets, and Chuck E. Cheese are hyper-links, which when clicked, pull up the home pages of each respective sponsor. PS Proposed Findings at ¶¶ 848-849.
- On the *Barney* home page, which is linked to the PBS kids home page, the logo for Chuck E. Cheese is a hyper-link, which when clicked, pulls up the home pages of this sponsor. PS Proposed Findings at ¶¶ 850-851.
- On the *Dragon Tales* home page, which is linked to the PBS kids home page, the logos for Kellogg's Frosted Flakes and Fruit Loops are hyper-links, which when clicked, pull up the home pages of each respective sponsor. PS Proposed Findings at ¶ 853.

Although PTV suggests that commercial broadcasters alone are guilty of foisting sugar-coated cereal on young children, PTV Proposed Findings at ¶ 407, PBS is clearly in on the game as well.

### 3. Commercialism.

Unlike many commercial broadcasts, where the show is simply one vehicle of many that an advertiser might use to convince people to buy their products, PBS programs often create a market for particular merchandise, from which PBS then receives a share of the resulting revenue. As a result, children are exposed to many licensed products tied-in to PBS children's programs: 50% of *Sesame Street*'s budget comes from tie-in merchandising. PS Proposed Findings at ¶ 626. When PBS enters into contracts for *Barney* or *Teletubbies*, ancillary shares of the toy and book revenue are a part of the contract. PS Proposed Findings at ¶ 843. Deals for

ancillary shares of toy, book, and video revenue added \$100 million to the PBS budget from 1994 to 1998. PS Proposed Findings at ¶ 844.

#### *4. Practical Considerations.*

As a practical matter, the issue of whether a program airs with or without commercials should be a complete non-factor in these proceedings, for several reasons. To begin with, devices such as a TiVo, or a remote control, give viewers simple and effective mechanisms to avoid watching commercials if they so choose. PS Proposed Findings at ¶ 857. A simple click, and the commercial vanishes. Moreover, in these proceedings, it is programming that is compensable, not the format in which that programming is delivered to viewers. The CARP is charged with compensating copyright owners that own program content, PS Proposed Findings at ¶ 856, and the value of the content of the programming aired on PBS is the same whether it has commercial interruptions or not. PS Proposed Findings at ¶ 855.

#### **G. There Is No Credible Evidence That The High Level Of Program Duplication That Results From Importation Of PTV Distant Signals Is Valued By Cable Operators As "Scheduling Diversity."**

In paragraph 15 (bullet 7), PTV asserts that because cable operators want to expand their subscriber base, they "don't want to just duplicate," existing programming in their channel lineup. PTV Proposed Findings ¶ 15. Of course, given the vast reach of local PTV signals, program duplication is the rule with PTV rather than the exception. Recognizing this, PTV attempts a spin to account for duplication of its own programming. Rather than talking about "duplication," in paragraphs 412-420 of its Proposed Findings, PTV claims it offers "scheduling diversity" by presenting identical (duplicative) programs in time slots that may be only 30 minutes apart. With respect to all other categories of programming, this would be "duplication" that counts against the particular claimants, but with PTV such "diversity" is alleged to be a "major reason" why cable operators choose to carry a PTV signal distantly. PTV Proposed



Findings at ¶ 412, 536, 538. The only support for this spin again comes from the testimony of Mr. Fuller, which is an important indicator of its real-world merit.

#### **H. PTV-Type Programming Is Not Unique And Was Widely Available In 1998 And 1999.**

In an apparent effort to establish PTV programming as a scarce market resource (and therefore more valuable than other programming types), PTV claims that "[t]he programming found on Public Television is not available in any comparable form on commercial television," PTV Proposed Findings at ¶ 513, and that "[i]n contrast to cable networks that launched or increased in prominence since 1992 to supply many additional sources of movies, syndicated programming, and sports, relatively few cable networks with programming that is facially similar to PTV's programming launched after 1992." PTV Proposed Findings at ¶ 98 (citations omitted).

However, PTV has acknowledged that many qualities that used to be attributed solely to PBS are now being attributed to look-alike channels. PS Proposed Findings at ¶ 815. In addition, Professor Thompson identified the following cable networks that carry programming that is similar to or competitive with PTV programming: Discovery, Nickelodeon, A&E, The Weather Channel, The Learning Channel, History Channel, Disney, Comedy Central, Animal Planet, HGTV, Food Network, Bravo, Travel, Toon Disney, BBC America. PS Proposed Findings at ¶ 612. Moreover, PTV's (counterintuitive) argument that widespread availability of look-alike channels shows the value of PTV (rather than its shrinking market share and irrelevance), implicitly acknowledges the huge increase in PTV-like programming since 1990-1992. *See* PTV Proposed Findings at ¶ 438-448. Again, if such an increase occurs in other program categories, it demonstrates "duplication" and a lack of market value, but an increase in PTV look-alikes somehow means the opposite for PTV. That dichotomy makes no sense.

## **I. The Days Of PTV's Monopoly On Program Quality Are Long Gone.**

It is no secret that PBS was one of the places viewers traditionally went, by old aesthetic standards, for "good" television. PS Proposed Findings at ¶ 610. However, the days where PBS was the only choice for "good" television are long gone, PS Proposed Findings at ¶ 611.

By the standards of many viewers and critics, HBO is now the most exciting place in television from an aesthetic standpoint, and has been for about five years. PS Proposed Findings at ¶ 621. Syndicated series have also been at the center of a flowering of American television drama for two decades, with shows such as *Hill Street Blues*, *St. Elsewhere*, *Moonlighting*, *Twin Peaks*, and *The West Wing* demonstrating the maturation of television as an art form. PS Proposed Findings at ¶ 622. Series like *Seinfeld* and *The Simpsons* are nearly unanimously seen as not only impressive commercial successes, but significant artistic successes as well. PS Proposed Findings at ¶ 623.

This sentiment is shared by the public according to a study conducted by the Annenberg Public Policy Center entitled "Media in the Home – 1999" and cited by PTV in its direct case. In the category of "Where parents believe best programs for young people can be found," PBS scores decreased almost 18% from 1997 to 1999. PS Proposed Findings at ¶ 832. In the category of "Where 10 to 17 year olds believe the best programs can be found" the scores are substantially higher for broadcast and cable signals than they are for PBS. PS Proposed Findings at ¶ 834.

The discussion above is largely irrelevant, however, as program quality is not a useful metric in these proceedings, for at least three reasons. First, quality is "in the eye of the beholder," as PTV itself acknowledges. PS Proposed Findings at ¶ 782. Second, under existing CARP precedent, quality cannot be used as a basis for royalty awards. PS Proposed Findings at p. 214. Finally, there is no direct link between program quality and market value, as there could

be high-quality programs that have low market value, PS Proposed Findings at ¶ 784, and low-quality programs that have high market value. PS Proposed Findings at ¶ 785.

**J. Broadcaster And Cable Operator Business Models Are Based On The Same Thing, Attracting Viewers.**

Throughout his testimony, Professor Carey emphasized that cable operators' desire to "attract and retain subscribers" and to have highly rated programming are simply two sides to the same coin. "Ultimately, the cable operator and the broadcaster think about viewing numbers the same way, because the cable operator is concerned about the number of eyeballs that come to the set that eventually decide to pay their cable bill every month." PS Proposed Findings at ¶ 170. Notwithstanding the clear thrust of Professor Carey's testimony, PTV mischaracterized his testimony to support several of PTV's contentions.

For example, in paragraph 17 of its Proposed Findings, PTV cites Professor Carey for the following "fact": "[Cable operators] will value programming differently than a broadcast station or broadcast network that is solely dependent on advertising revenues generated by a single channel of programs." While Professor Carey did agree that differences in advertising revenues create different motivations in the way cable operators and broadcasters conduct their business, he was clear that both value programming in terms of the viewing it attracts. Carey, tr. 7037-38; PS Proposed Findings at ¶ 171 ("While there are differences in the business models of the broadcaster and cable operator, the models are based on the same thing, attracting viewers.").

In addition, in paragraph 18 of its Proposed Findings, PTV states the following: "Cable operators do not necessarily seek to maximize the audience for any particular distant signal ... but rather seek to maximize the value of different channels of programming in terms of attracting and retaining subscribers." (citations omitted). This claim was directly contradicted by Professor

Carey who, when asked this very question by PTV, remarked that maximizing viewing was a concern to cable operators, because it helped attract and retain subscribers. Carey, tr. 7030-36.

Finally, in paragraph 20 of its Proposed Findings, PTV states that "the value of a distant signal to a cable system can be measured only by its ability to attract and retain subscribers." (citations omitted). Professor Carey maintains unequivocally that viewing is a central concern of cable operators and a measure of value, because it identifies what programs or signals help attract and retain subscribers. Carey, tr. 7030. Furthermore, support for this notion was also provided by Judith Allen, former National Cable Television Association Executive Director, who stated that ratings are a factor in evaluating whether to carry a distant signal, and noted that if a cable operator was confronting a decision about whether to add a distant signal they might look at how popular, in terms of viewership, that channel is in its local market. Allen, tr. 6026-27.

**K. The "Fees Gen" Approach Is The Only Distribution Theory That Does Not Disparately Reward PTV For The Market Undervaluation That Effects All Claimant Groups.**

No CARP has ever rendered "a legal determination" that the "fees gen" approach cannot be applied to PTV based on the fact that PTV programming constitutes an entire distant signal. See PTV Proposed Findings at ¶ 500. The CARP in the 1990-92 proceeding used this method for determining the Canadian Claimants' award as it, too, involves an entire distant signal. *Id.* at n. 39. Canadians have adopted this methodology once again, showing its continuing vitality. There is no legitimate reason to treat PTV and the Canadian claimants differently in this Proceeding.

PTV misunderstands the key reason for applying the fees generated methodology to them. Program Suppliers do not propose or argue that the fees generated by the carriage of PTV is equal to the market value of PTV programming, although it is entirely possible that it is. Rather, such a conclusion is unnecessary to set PTV's award at an amount equal to its fees

generated. Every claimant (save the Canadians) believes that their programming is worth more than the fees that cable operators pay for its carriage. While the evidence of this fact for Program Suppliers is much stronger than for PTV (see WTBS increased fees after conversion), we can assume *arguendo* that it applies to PTV. However, if the amount awarded to PTV exceeds its fees generated, then other claimant groups necessarily will receive less than the fees paid for carriage of their programming. PS Proposed Findings at ¶ 875. In order to award a claimant group less than its fees generated, the Panel must reach the conclusion that a claimant group(s) is worth less than the fees paid to carry its signal. PS Proposed Findings at ¶ 876. PTV has offered no evidence that the Program Suppliers claimant group has a market value lower than what is paid to carry its programming. PS Proposed Findings at ¶ 874. In fact, substantial evidence exists to the contrary. PS Proposed Findings at ¶ 220. Accordingly, PTV cannot be awarded more than its fees generated if the result is that Program Suppliers receive less than the fees generated for carriage of Program Suppliers' programming. The record simply does not support such a result.

### **III. THE RECORD DOES NOT SUPPORT THE ROYALTY SHARES PROPOSED BY NAB.**

At the opening of NAB's case, its counsel remarked that NAB's share increased whenever NAB litigated a CARP proceeding. *See* tr. 1559, 1567-68. That history, perhaps, has given NAB the illusion that all it needed to do was put in an appearance and its request for a nearly 100% increase in royalty share over its 1990-92 award was guaranteed. This illusion may also explain the dearth of evidence for NAB's extremely large and unrealistic increase.

NAB's claim that circumstances changed between 1992 and 1998 warranting a drastic re-allocation of royalty shares, and, in particular, an increase in share for NAB is unsupported. NAB has chosen to sponsor very little meaningful credible evidence of its own to support its claim. Instead, NAB relies on favorable portions of evidence presented by other parties. Even so, neither NAB's own evidence nor other evidence cited by NAB justifies NAB's requested increase. Consequently, the Panel must reject NAB's proposed award.

#### **A. NAB Fails To Establish A Connection Between Its Perceived Changed Circumstances and Value.**

NAB contends that the major changed circumstance that occurred between 1992 and the 1998-99 period is the conversion of WTBS from a distant signal to a cable network. To quantify the effect of this conversion, NAB proffers only the Fratrik Study which is fraught with problems, namely, that it (1) measures time, not value; (2) is statistically invalid; and (3) does not actually depict significant changes in the mix of programming available on distant signals.

The conversion of WTBS confirms not increased value of local programs, but instead, the high value Program Suppliers' programming would achieve in a free market. WTBS's performance since becoming a network demonstrates beyond doubt that, in a world without

compulsory license, Program Suppliers' programs have a much greater value than the amount paid to carry the programming under the compulsory license.

Further, the Nielsen results are equally unavailing to NAB. The 1990-92 Nielsen results are not comparable to the 1998-99 Nielsen results because of the unavailability of demographic data and the avidity adjustments. Moreover, NAB's reliance on raw Nielsen results ignores the downward effects caused by the diminished value of NAB's programs between 1992 and 1998-99. Therefore, when the Nielsen viewing results are considered in light of these adjustments, they do not support NAB's claim of increase in the value of its programs.

Finally, the professed effects of clustering are illusory because the clustering study excludes superstations which dominate the instances of carriage on distant signals.<sup>7</sup> In addition, the supposed effect of clustering is negated by the emergence of regional competition.

*1. NAB's Fratrik Study Does Not Measure Change In Marketplace Value Of Programming.*

NAB contends that the major changed circumstance affecting the relative marketplace value of programs was the conversion of WTBS from a distant signal to a cable network. NAB Proposed Findings at 136. NAB argues that because WTBS was very widely carried, its conversion significantly shifted "the relative amounts and types of programming purchased by cable operators as signals" (suggesting that cable operator purchased more of certain types of programming and less of others). *Id.* NAB does not actually present any evidence of a *change in value* to support its contention. Instead, NAB offers the Fratrik Study - a study of weighted program time for 1992, 1998 and 1999. NAB then asks the Panel to equate changes in market value of programming with changes in the percentage shares of weighted program time for each

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<sup>7</sup> As noted, NAB's principal basis for changed circumstances is the conversion of WTBS. Yet, its own study of the effects of clustering ignores distant signal carriage of superstations.

of the claimant categories. NAB Proposed Findings at 137 (§ 215). But no prior distribution determination and no witness here supports a conclusion that program time properly can be used to measure changes in program *value*.

Past decisions have soundly rejected time as a measure of, or as having primary significant relevance to, the market value of programs. "[A]n allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming." *1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63037 (September 23, 1980). As the CRT reiterated, "time based formulas do not provide useful guidance for [ ] distribution functions." *1979 Cable Royalty Determination*, 47 Fed. Reg. 9879, 9897 (March 8, 1982). Indeed, NAB's presentation of time studies in the 1979 decision prompted the scathing comments by other parties that were ultimately adopted by the 1979 CARP:

'The substance of NAB's claim, stripped of its attempted patina of sophistication, is time alone,' Proposed Findings and Conclusions of the MPAA and Member Companies, p. 90; 'Incredibly, the NAB has come back this year and again proposed that the Tribunal should accord primary importance of the time factor,' Proposed Findings of Fact and Conclusions of Law of the Joint Sports Claimants, pp. 118-19; 'The NAB produced witnesses whose testimony, like the NAB's case, had a familiar ring: it was primarily based on time considerations,' Proposed Findings of Fact and Conclusions of Law by Music, p. 25.

*Id.* at 9893, 9900, n. 488.

Even Dr. Fratrik admitted that his study did not measure value, Fratrik, tr. 2416, as did Dr. Ducey. Ducey, tr. 1721-22. *See also* NAB Proposed Findings at 22 (§ 23). Cogent reasons exist against using time to measure value. Time studies ignore the importance of dayparts, viewership and the demographic makeup of viewers, which are critical value measures in negotiations between buyers and sellers of programming and between buyers and sellers of



advertising. PS Proposed Findings at 104 (¶¶ 135-137, 697, 700). Programmers pay more for shows broadcast in certain time periods than in other time periods. They also pay more for shows with more viewing than shows with less. Similarly, advertisers pay more for ad spots for more popular shows than for less popular shows. Plainly, the increase (or decrease) in the relative time share a program category occupies does not denote a corresponding change in the value of that programming. Consequently, a change in the *share* of programming time as shown in the Fratrik Study, does not demonstrate a change in program value. The most vital aspects of program value, which were ignored by the Fratrik Study, are whether people watched the programming, what type of people watched the programming, and what time of day the programming aired. Asking this Panel to accord value, upward or downward, based on changes in program time is inappropriate.

Further, the Fratrik Study is statistically and methodologically flawed. As Program Suppliers noted, the study uses an invalid sample. Frankel written rebuttal, 16; PS Proposed Findings at 199-201. Also, Dr. Fratrik provided no credible evidence as to why weighting by subscribers is appropriate. *See* PS Proposed Findings at 201-02. The study also erroneously equates signals that cable operators “must carry” with signals cable operators carried by choice. *Id.*

NAB's assertion that the difference between unweighted shares of program between 1992 and 1998-99 (as done by Mr. Whitt) is a partial indication of value cable operators placed on distant signal program types, NAB Proposed Findings at 20, misses the mark. Cable operators do not choose proportions of programming - they carry entire signals. Ducey, tr. 2115. The proportion (or mix) of programming can be determined only by looking at the collective mix of the programming cable operators carried. Looking at the collective mix of programming, the

unweighted data shows no significant shift in programming available on distant signals between 1992 and the 1998-99 period. Thus, only by adding subscriber weighting to program time (a method which NAB has failed to show bears any merit), can NAB create a shift in proportion of programming types between 1992 and the 1998-99 period (including an increase in the time for NAB and PTV programming). NAB Proposed Findings at 21-22 (¶ 22). The record shows that the mix of programming available on stations carried as distant signals by cable operators collectively remained close to the same between 1992 and the 1998-99 period PS Proposed Findings at 97-98 (¶¶ 666-67).<sup>8</sup> Nielsen's viewing data for the same period corroborates this point. Importantly, the majority of the programs available on distant signals remained Program Suppliers' programming.

While NAB's time-based analysis fails to show that the conversion of WTBS resulted in changes in either the relative time or market values of programs, TBS's performance, since becoming a cable network, solidifies the high value Program Suppliers' programming would command in a free market. Upon converting to a cable network, TBS increased the proportion of syndicated series and movies, which already constituted the overwhelming majority of its program line-up. This clearly shows that syndicated series and movies were highly valued by

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	Nielsen Quarter Hours (Full Year)		
	1992	1998	1999
Commercial TV	13 %	13.0%	12.9%
Program Suppliers	56 %	51.7%	51.5%
Devotional	6 %	5.1%	3.8%
Joint Sports	1 %	1.1%	1.1%
Other	2 %	0.1%	0.1%
Public Television	23 %	29.1%	30.6%
Total	100 %	100.0%	100.0%

Source: PS Ex. 20; PS Ex. 22; PTV Ex. 20-X. Note also that the share of NAB's programming is virtually the same in all three periods. NAB's Exhibit 49-RX seeks to refute this consistency with a percentage-of-a-percentage calculations.

TBS. This valuation of TBS's programming mix was affirmed by cable operators who paid higher fees for TBS when it became a cable network. Ducey, tr. 1814-18; Gruen, tr. 7940-41. TBS's carriage also increased after conversion. *Id.* Therefore, TBS, with a greater share of Program Suppliers' programming, increased its carriage and licensing revenues (to the point of being the seventh highest earnings cable network, Gruen written rebuttal, 18) after its conversion. That confirms the high value of Program Suppliers' programming in the marketplace.

2. *The Nielsen Viewing Studies With Accompanying Analysis Do Not Support An Increase In The Value Of NAB's Programming.*

The Nielsen Viewing Studies and accompanying analysis are the best evidence in this proceeding of the marketplace value of programming. For the first time, Nielsen offered demographic data in addition to household data. Both sets of data show that Program Suppliers' programs are most viewed. As even NAB concedes, Nielsen overcame many of the criticisms from the 1990-92 CARP proceeding. NAB Proposed Findings at 132-133 (¶ 210). Thus, the Nielsen Viewing Studies here are more reliable than those used in the 1990-92 CARP Proceeding.

Program Suppliers do not claim that the Nielsen results, alone, can be the final arbiter of royalty distribution. As always, Program Suppliers complement the viewing results with corroborative market data. NAB, nonetheless, ignores this comprehensive approach, choosing instead to cling to the raw household results as illustrative of changed values for the different program categories. Its reliance on the raw household Nielsen Viewing Studies to support its changed circumstances argument is not at all surprising because those data do indicate increases in the share of viewing minutes for local programming. However, an analysis of changed

circumstances and market value is incomplete without looking at both the 1998-99 Nielsen Viewing Studies and the accompanying analysis.

First, the 1990-92 Nielsen viewing studies are not completely comparable to the 1998-99 data. The Nielsen results here, unlike those offered in the 1990-92, provide demographic (age) group information. This new and comprehensive demographic viewing data is more insightful for the purpose of market value analysis because it separately reports the 18-49 viewing, the most relevant demographic for the purpose of determining market value. PS Proposed Findings at 45 (¶ 281), 84 (¶ 571), 22 (¶ 150), 104 (¶ 697), 114 (¶ 990-91), Tagliabue, tr. 153; Trautman, tr. 364; Walden, tr. 4114-15. Program Suppliers note that their 1998-99 average viewing share in the 18-49 demographic group (69.6%) is substantially higher than their viewing share for households (59.95%). PS Ex. 20, 22. By contrast, NAB's average viewing share in the 18-49 demographic group (11.45%) is substantially lower than its average viewing share for households (14.70%). *Id.* As this type of demographic information is regularly used in program valuation decisions, and was not part of the record in the 1990-92 proceeding, it compels a fresh and independent look at how Nielsen viewing results should be used to set awards.

Second, Program Suppliers offer, here, an avidity adjustment to the Nielsen Viewing Studies. Such an adjustment was not done in the 1990-92 proceeding.

Third, as discussed below, there is other significant evidence of decline in the marketplace value of local programming, which also requires downward adjustments to the shares result for NAB.

Fourth, network affiliates, on which most of NAB's viewing minutes are derived, benefited from the "must carry" regulation that requires cable operators to carry stations they were not inclined to carry. PS Proposed Findings at 74, 97-99. The net effect of this guaranteed

(or forced) carriage, obviously, resulted in greater apparent demand for network affiliates than would occur in a free market, and thus greater amounts of local programming. Because Nielsen's sample selection only looks at what signals are available, it would not have considered how the must-carry factor influenced carriage, and how network affiliates and local programming could have been overrepresented.

What NAB's reliance on the Nielsen Viewing Studies underscores is that the Nielsen Viewing Studies, more than any other study in these proceedings, reflects market behavior. If, as the evidence demonstrates here, the Nielsen data are most reflective of market behavior, past CARPs must have undervalued Program Suppliers' programs by not awarding shares that most closely approximated the Nielsen viewing results. This CARP has the authority to correct those past incidents of undervaluation by making awards here that more closely approximate the adjusted Nielsen viewing results.

In sum, looking at the raw household viewing numbers does not end the analysis of programming value. Demographic and avidity adjustments must be factored into the analysis. NAB clearly did not account for these factors. Accordingly, its reliance on the raw Nielsen data is wholly without merit.

### *3. The Value Of Station-Produced Programming Declined.*

As NAB admits, the "great majority" of its claimed programming consists of local news programs. NAB Proposed Findings at 28 (¶ 33). The remaining small minority of NAB programs includes "sports-related programs . . . morning shows . . . public affairs shows, documentaries, and specials." *Id.* The evidence demonstrates that the value of NAB's programs has declined since 1992 for two principal reasons: increased competition from cable channels and increased consolidation in the broadcast industry. NAB Proposed Findings at 105; Carey, tr. 6984. The latter had the effect of decreasing the amount of resources and time devoted to local

programs, while the former had the effect of decreasing the already low interest among cable subscribers in such programs.

NAB's claim that its programming accounts for 13% of all distant signal programming, NAB Proposed Findings at 28 (¶ 33), relies on the weighted Fratrik Study that was fraught with problems. PS Proposed Findings at 198-202. Unweighted minutes show very little change from 1992 to 1998-99. PS Proposed Findings at 97-98 (¶¶ 665-67). Most of this programming was broadcast on network affiliate stations, *id.* at 97 (¶¶ 664-65), and distant carriage of network affiliates declined by about 25% during this period. *Id.* (¶ 741). This decline undercuts NAB's claim that the presence of local programs (NAB Proposed Findings at 29 (¶ 34)) made carriage of network affiliates attractive to subscribers or operators. Moreover, most of the local programming on network affiliates was news broadcasts that occurred several times throughout the day, and that often repeated earlier segments. PS Proposed Findings at 104-05 (¶¶ 702-04). In fact, approximately two-thirds of the allegedly unique local programs on which NAB relied in the 1990-92 proceeding were no longer on the air in 1998-99. PS Proposed Findings at 111 (¶ 749).

This trend toward more repetitive newscasts occupying a greater share of local programming placed NAB programming in greater competition with national and regional cable networks that focus on news, financial information, sports, and weather as well as the increased availability of similar type information from the internet. PS Proposed Findings at 105 (¶ 705). In the period between 1992 and 1998-99, regional sports and news networks grew, thus giving subscribers alternatives for news broadcasts on distant signals from the larger cities in a region or for distant signal shows about the "local" sports teams in a region. NAB Proposed Findings at 31-32 (¶ 38). The two stations, WJZ and KYW, picked by NAB as representative of the local

programming on all distant stations, showed declines from 5%-10% in viewing to their news programs because of the increased competition that they faced in their markets. PS Proposed Findings at 105. (¶¶ 705-06). In addition, the around-the-clock availability of a wide range of information sources on the internet lessened the need for subscribers to wait for newscasts from a distant station to find out up-to-the-minute news. PS Proposed Findings at 105 (¶¶ 705-06).

Dr. Ducey presented only four programs in this proceeding to show the claimed value of local programming, compared to the 50 programs he introduced in 1990-92, which is indicative of the reduced number of programs produced by stations. Despite that, the two WGN programs in his list are the types of programs that can be expected to appear on regional news and sports networks. NAB Proposed Findings at 39 (¶ 48-49). One is in-depth coverage of particular news stories, similar to coverage on 24-hour news channels that can provide those types of in-depth segments on a daily basis. The other, WGN's post-game show, is replicated on regional sports networks (along with a pre-game show and continuing features about the team and upcoming games) which can devote more time to such features. In addition, station-produced programs could wind up as syndicated programs. Ducey, tr. 2007.

Interestingly, although NAB claims the regional appeal "is particularly significant because of the 'clustering' phenomenon," NAB Proposed Findings at 36 (¶ 44), two of the four programs highlighted were on WGN, a station (along with all other superstations), *id.*, which NAB did not survey in its so-called clustering testimony. Thus, half of the evidence NAB presented has no relevance to the claimed clustering. Moreover, NAB's study ignores the majority of the carriage population, given that the superstations ignored by the clusters study comprise well over half of the instances of distant signal carriage. PS Proposed Findings at 107 (¶¶ 714-16). In addition, Dr. Ducey indicated that clustering had no effect on program value. PS

Proposed Findings at 108 (¶ 723). Taking NAB's testimony at face value, the increase in clustering is very small: from 86.9% in 1992 to 89.2% in 1998 (NAB Proposed Findings at 37-38 (¶ 45), or an increase of about 2%. That change could as easily be explained by consolidation among systems as by any change in distant signal patterns. Finally, the close-by non-superstation distant signals measured by NAB are precisely the ones that would be most affected by competition from regional news and sports networks, which are centered in larger cities in a region.

*4. Other Evidence of Changed Circumstances Relied Upon By NAB Does Not Support Its Contentions.*

NAB's other proposed findings as to changed circumstances, while irrelevant, merit a brief retort. NAB suggests that the discontinuation of the carriage of WWOR as a distant signal had an adverse impact on the value of Program Suppliers' programs. NAB Proposed Findings at 23 (¶ 24). Yet NAB offers no evidence as to how other parties' whose programs aired on WWOR should be affected. NAB also fails to quantify the supposed impact of the loss of WWOR on Program Suppliers' programs.

NAB also suggests that some adjustment should be made to the value of Program Suppliers' programs because of a purported increase in non-compensable programming on WGN between 1990 and the 1998-99 period. NAB Proposed Findings at 24 (¶ 26). As a general matter, these so-called WGN adjustments (proposed by both NAB and PTV) are sham adjustments to lower Program Suppliers' shares. For reasons stated in Program Suppliers' Proposed Findings, these adjustments, as proposed to the Bortz Study, are completely without evidentiary support. *Id.* at 221-22. Moreover, the adjustments would be equally unwarranted to the Nielsen Viewing Studies because Nielsen only measures viewing to compensable programming. *Id.* Furthermore, since the so-called adjustment is based on data obtained from



the flawed Fratrik Study, NAB should have provided full testimony and analysis of the issue in its direct case where it initially presented the Fratrik Study testimony rather than at this late hour. Finally, it seems disingenuous and transparent that while PTV Exs. 12-X and 13-X both show other programming categories that are effected by program substitution on WGN, NAB recommends adjustments only to Program Suppliers' programming. At bottom, the WGN changes are based on a measure of time which does not measure value.

**B. Record Evidence Of Market Value Cited By NAB Does Not Support NAB's Share.**

NAB's market value analysis is unsupported. Unlike NAB, which merely speculates, Program Suppliers presented analogous market evidence showing that a free distant signal marketplace would operate essentially the same as the cable network marketplace. NAB relies substantially on the testimony of cable operator witnesses from past proceedings to establish the value of local programming. Such reliance is of no relevance to the marketplace value in 1998-99.

NAB opened its case promising to present an analysis of market value that would be both "comprehensive" and "unprecedented" in scope. *See* tr. 1569; Ducey, tr. 1606. NAB touted what appeared then to be its principal piece of evidence, the NAB Regression Model. NAB's regression analysis, which purports to present the relative market value of the competing program categories, is nothing more than an analysis of program time because NAB uses only the coefficients of Programming Minutes as the NAB Regression Model results.<sup>9</sup> NAB's regression analysis has been roundly criticized by several expert witnesses. Indeed, the record is replete with evidence that the NAB Regression Model is flawed both as a statistical model and as

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<sup>9</sup> NAB Regression Model utilizes programming minutes (program time) from the flawed Fratrik Study as independent variables.

an economic model. The weight of the criticisms may have motivated NAB to downgrade its regression analysis from principal evidence to mere corroborative evidence. NAB Proposed Findings at 51 (¶ 67).

NAB's reliance on the raw Bortz Study results is misplaced. While the raw results are close to NAB's regression analysis, the study is not presented without adjustments. Thus, NAB's strict adherence to the raw results is nothing more than cherry-picking. Moreover, NAB does not provide any corroborating market data of its own as it did in the 1990-92 CARP proceeding.

Similarly, NAB's attempt to bootstrap the Nielsen Viewing Studies as evidence of the market value of its programming is also futile. Program Suppliers do not present the Nielsen Viewing Studies, alone, as complete evidence of value. Thus, NAB cannot simply accept only the portions of the Nielsen results favorable to it; it must embrace the entire studies, including the accompanying economic analysis presented by Program Suppliers.

*1. A Free Distant Signal Marketplace Would Look Like The Current Cable Network Marketplace, Which Looks Like The Broadcast Station Marketplace.*

NAB contends that the "cable television marketplace operates under fundamentally different dynamics than the broadcast marketplace." NAB Proposed Findings at 25 (¶ 28). According to NAB, the principal difference depends on whether operators will obtain advertising revenues. *Id.* at 29. As operators cannot obtain revenues for distant signals under the current royalty scheme, NAB's point assumes a simulated market in which compulsory license still exists. But that is not reflective of what an actual free market would look like. Even in NAB's compulsory license context, its argument ignores the reality that cable operators do not program channels, and thus whether operators receive advertising revenues will have little effect on what programs are included on distant signals. In contrast to the small amount of advertising revenue received by operators, (approximately 5%, Carey tr. 7017-18) cable channel providers depend

heavily (cable networks) or entirely (distant signals) on advertising revenues, and thus will make program decisions that will enhance those revenues. Those decisions turn largely on ratings and demographics data.<sup>10</sup>

The 1990-92 CARP recognized this reality by noting that a simulated free distant marketplace "looks a great deal like the cable network market," primarily in that operators purchase entire distant signals just as they purchase entire cable networks. 1990-92 CARP Report at 24. The veracity of that finding has been emphasized by the conversion of TBS from a distant signal to a cable network. By all accounts, the conversion was done seamlessly, with TBS retaining virtually all systems that had offered it as a distant signal, and adding new systems. Equally telling, TBS was able to increase its license fees substantially as a result of the conversion. PS Proposed Findings at 75 (¶¶ 501-502). TBS's conversion provides real world experience of how a channel subject to the compulsory license would operate in a free market.

As Mr. Sieber's testimony from the 1990-92 proceeding makes clear, TBS has always relied very heavily on viewing information to make its programming decisions. 1990-92 written direct, 21; 1990-92 tr., 3747. *See* PS Proposed Findings at 25-26 (¶¶ 169-75). Contrary to NAB's claim, NAB Proposed Findings at 26 (¶ 30), that operators are not interested in programs that maximize audiences, the almost universal carriage of TBS, which clearly looks to maximize audiences with its programs, affirms the value of this approach to cable operators. This view was corroborated by Mr. Lindstrom's testimony that Nielsen viewing data are purchased by every major cable network, most of the largest cable MSOs and by many individual cable systems. PS Proposed Findings at 32 (¶ 207). This also refutes NAB's claim that operators "do not use

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<sup>10</sup> In a free marketplace, one without compulsory license, cable operators could derive advertising revenues from carriage of distant signals. PS Proposed Findings at 112 (¶ 752).

viewing data in evaluating distant signals."<sup>11</sup> NAB Proposed Findings at 27 (¶ 32). In addition, no party disputes the underlying point of Dr. Gruen's analysis showing that the highest rated cable networks received the highest license fees. PS Proposed Findings at 46 (¶ 287).

In short, a free market for distant signals would closely resemble the current free market for cable networks. In the cable network market for programs, heavy reliance is placed on programs that will maximize audiences because that will attract and retain the most subscribers.<sup>12</sup> Again, TBS provides an actual working model of what would likely occur. Although NAB suggests that operators would be more interested in "programs that are not already available to subscribers from off the air" (NAB Proposed Findings at ¶ 30), TBS went the other way, and virtually eliminated what was its local, station-produced programming in favor of more syndicated programs. PS Proposed Findings at 110 (¶ 743). TBS's success in the free cable network market underscores the value of syndicated programs that maximize audiences in the cable industry.

In short, a free distant cable market would look a lot like the current cable network marketplace because in both cases the channel provider will decide what programs to carry on their channels, and operators will purchase the channels in their entirety. Cable networks, like broadcast stations, rely heavily on viewing data to determine what programs will attract and retain subscribers, as evidenced by the facts that cable networks with the highest viewing are, on average, those with the most subscribers and the highest license fees.

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<sup>11</sup> NAB's statement could be literally true for many distant signals because no distant viewing statistics (outside of these proceedings) is available for many distant signals. Nonetheless, distant viewing for WTBS, WGN, and other heavily carried superstations has long been reported by Nielsen. Lindstrom, tr. 7289.

<sup>12</sup> In this respect, it is noteworthy that the highest rated cable networks are also those with the largest subscriber bases among all cable networks. Sieber 90-92, tr. 3744. PS Proposed Findings at 185.

*2. Testimony Of Cable Operators From Past Proceedings Is Irrelevant To The Determination Of Value Of Programming During The 1998-99 Period.*

NAB relies on cable operator testimony "in this and prior distribution proceedings" as evidence of value of local programming on distant signals. NAB Proposed Findings at 38-9 (¶ 47). NAB cites prior testimony -- *see* NAB Proposed Findings at 39-45 (¶¶ 49-52, 55) (discussing 19, 90-92); (¶¶ 53-4, 56) (discussing 1989) -- that indirectly addresses the value of local programming. *See* NAB Proposed Findings at 45 (¶ 56) (claiming that testimony of JSC witness about sports programs discusses points that "[s]tation-produced newscasts share . . . with sports programs"); *see also* NAB Proposed Findings ¶ 57 (similar testimony). Testimony from prior proceedings is of limited use here, particularly 1989 testimony, given the changes that occurred in the cable industry in the decade between that time and 1998-99. Moreover, that testimony was presumably given whatever weight the CRT or CARP thought appropriate in setting NAB's shares at much lower levels than NAB is requesting in this case. If testimony from prior cases would not support higher shares in those years, it is difficult to see how it could be used to support a higher share in this case involving a different time period and different circumstances.<sup>13</sup>

*3. NAB's Regression Analysis Is Severely Flawed And Does Not Provide Evidence Of Marketplace Value Of Programming.*

NAB began the instant proceeding extolling the supposed virtues of its principal evidence, its regression analysis. It characterized the Fratrik Study as "of unprecedented scope," and described the NAB Regression Model as "of a comprehensive scope." NAB Phase I Direct Case at 4. One obvious implication of these characterizations was that NAB would introduce

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<sup>13</sup> For example, NAB has not made a showing that the systems involved carried the same distant signals in 1998-99 as they did when the witnesses testified. Nor has NAB shown what other signals were offered at the time, and how they compared to those offered in 1998-99. PS Proposed Findings at 185.

here a never-before-seen analysis regarding market value of its programs and the allocation of royalties. NAB's analysis is neither novel nor comprehensive. Relying on two witnesses with virtually no experience with valuation of programming or of the cable industry, NAB has produced yet another study of time as it did for proceedings involving 1978 and 1979 cable royalties, and a regression analysis as it did for the 1979 cable royalty proceeding. 45 Fed. Reg. 63026 at 63038; 47 Fed. Reg. 9879 at 9883; Ducey, tr. 1745-56.

The Panel must reject NAB's regression analysis as evidence of market value. Program Suppliers already have set forth, in great detail, the severe flaws contained in NAB's regression analysis. PS Proposed Findings at 191-209. The NAB Regression Model is untenable as a statistical model because it is poorly specified. In addition, the Model (1) is a poor predictor of royalties because it places undue reliance on programming minutes variables which explain very little of the variation in royalties; (2) produces highly volatile coefficients associated with programming minutes; and (3) relies on the flawed Fratrik Study. PS Proposed Findings at 191-202. The NAB Regression Model fares no better as an economic model because it fails to simulate a free marketplace and it uses Programming Minutes (program time), which is not a good measure of value, as its main analytical tool.

NAB's analysis bears two elementary mistakes. First, it is a study of program time. As stated, program time is an inappropriate measure of value because it ignores the distinctions among dayparts, demographic groups and audience levels, factors which buyers and sellers of programs deem very important indicia of value. Second, NAB's regression analysis focuses on the irrelevant question of what occurred in a market where compulsory license actually existed instead of focusing on the task of the Panel which is to allocate royalties by simulating a free marketplace.

Besides these fundamental problems, the NAB Regression Model also suffers from errors of specification, interpretation and application. PS Proposed Findings at 203-09. NAB correctly states that "an important early step in designing a useful regression analysis is to 'specify the model' to include as many of the important variables that are expected to have an effect on the ultimate 'dependent' variable." NAB Proposed Findings at 54. To that end, the NAB Regression Model is based on Programming Minutes as the key variables affecting royalties, employing Programming Minutes for each program category as independent variables and using their associated coefficients as relative market value prices for the respective program categories. However, doing so is a misspecification of the NAB Regression Model as to what drives royalties.

When Programming Minutes variables are isolated, they explain very little of the variation in royalty payments. PS Proposed Findings at 91 (¶ 637). Indeed, subscribers, not program time, are the key determinant of the variations in royalty payments. *Id.* If, as NAB claims, its objective was to employ the most important variables in its regression analysis, it failed to do so. By using only the coefficients associated with Programming Minutes for its relative market value calculations, it effectively rejected all other variables, including the most important variable, that explain changes in royalty payments.

NAB's inclusion of Control Factors in the NAB Regression Model seems pointless because it makes no attempt to use them or their coefficients in any calculations. In fact, NAB ignored the regression coefficients for the statistically significant Control Factors. Had NAB elected to include those coefficients in its results, the regression coefficients for Canadians and Devotionals, which the regression shows to be negatives, would have been positive. PS

Proposed Findings at 208-09. NAB's choice of Programming Minutes coefficients as the indicia of market value seems designed to fill a pre-destined choice, not the result of reasoned analysis.

The error of interpretation relating to the NAB Regression Model is singularly fatal because it distorts well-known economic concepts of value. It is undisputed that marginal or incremental value is the value of the last unit. PS Proposed Findings at 70 (¶ 464), 103 (¶ 693). It is also undisputed that the total value is the average value multiplied by the total number of units. *Id.* at 70 (¶ 467), 103 (¶ 694, 695). By definition, average value (*i.e.*, the value of a typical unit) is total value divided by the total number units. Gruen written rebuttal, 7. Also, marginal value would equal average value only if the value of each unit is the same. *Id.* at 70 (¶ 466).

Nonetheless, to arrive at total value of Programming Minutes for each program category, NAB takes the marginal value of the last unit for each program category in place of the average value, and multiplies that marginal value by Programming Minutes to calculate what it calls total value for each programming category. From that calculation, it computes the relative values (or shares) for each claimant category. NAB's calculations are wrong because they substitute marginal values for average values. NAB Proposed Findings at 55. NAB has presented no evidence that the incremental or marginal value for each program category is the same as average value. Consequently, what NAB claims is the resulting relative total marketplace value of each programming category is also wrong. PS Proposed Findings at 205-08.

*4. The Nielsen Viewing Studies And Bortz Study Results Require Adjustment To Properly Reflect The Marketplace Value Of NAB's Programs.*

NAB's assiduous effort to validate its otherwise unreliable regression results by comparing them to Nielsen Viewing Studies and the Bortz Study, NAB Proposed Findings at 58-59 (¶ 76-77), are to no avail. Whatever similarities exist among the Nielsen Viewing Studies, the Bortz Study and NAB's regression analysis results are merely coincidental.



NAB incorrectly assumes that the raw Bortz Study results, without adjustments, are indicative of the market value of NAB's programming. That is simply not the case because NAB ignores adjustments that may be required to its Bortz Study results. When NAB sought an award based on its Bortz award in the 1990-92 CARP proceeding, the CARP rejected NAB's request reasoning that NAB did not corroborate the 1990-92 Bortz Study results because: (1) the Nielsen results did not corroborate the Bortz Study results and (2) NAB's evidence of analogous market data was overstated and therefore unacceptable. 1990-92 CARP Report at 111-12. To reach a final allocation for NAB, the Panel gave NAB credit for some qualitative aspects of its programming, but determined that there was no changed circumstances warranting an increase of the value of NAB's programs. *Id.* The 1990-92 CARP then awarded NAB a little over half of its Bortz Study results. NAB deserves even less for 1998-99.

Although NAB's share under both the Nielsen Viewing Studies and Bortz Study results are similar, NAB has not provided its own corroborating evidence of these two studies. NAB cannot rely on its regression analysis because, as has been repeatedly pointed out in this proceeding, NAB's regression analysis is unreliable. While NAB attempts to highlight similarities between its regression analysis and the Bortz Study, JSC witnesses strongly criticize the NAB Regression Model. *See e.g.,* Crandall written rebuttal, 4 (variability of regression results), 9 (failure of Dr. Rosston's analysis to take account of seller's side). Importantly, JSC does not propose that NAB receive its Bortz Study share.

Similarly, the Panel must not permit NAB to cherry-pick the Nielsen data by ignoring the accompanying analysis. Strong market evidence, new and reliable demographic evidence, sound avidity adjustments are all factors that NAB must embrace along with the Nielsen Viewing Studies. Finally, the record evidence of the market value of NAB's programming solidly depicts

the diminished value of NAB's programming by the 1998-99 period. PS Proposed Findings at 209-212. Therefore, NAB cannot rely only on the raw study data presented by Program Suppliers and JSC, both of whom propose adjustments to the Nielsen Viewing Studies and the Bortz Study results, respectively.

#### IV. THE EVIDENCE DOES NOT SUPPORT MORE THAN A 2.33% AWARD FOR MUSIC CLAIMANTS.

##### A. Basing Music Claimants' Award On Dr. Schink's Comparison Of Programming Expenditures And Musical Works License Fees Is Appropriate.

Rather than stopping halfway and relying on a benchmark study, as Music Claimants propose, Dr. Schink's license fee study replicates and updates the marketplace analysis used in the original royalty determinations. Not only does it rely on better information than that available in previous years, it encompasses and incorporates information from the entire marketplace. *See* Schink written rebuttal, 14, 18-19. Further, reliance on actual market information obviates the need to determine a proper benchmark time period. Accordingly, this Panel should allocate Music's share according to Dr. Schink's license fee comparison.

Music Claimants argue that Dr. Schink's study was a surprise and thus should be disregarded. Music Proposed Findings at 45. Yet, they vigorously cross-examined Dr. Schink, presented numerous exhibits, and fully address the Schink study in their Proposed Findings. Music Proposed Findings at 45-71. Moreover, given Music Claimants' past reliance on license fee analyses in this and other proceedings, such a study is neither novel nor unforeseeable. *See* 1978 and 1979 Cable Royalty Determinations, 45 Fed. Reg. 63026 and 47 Fed. Reg. 9879, respectively.

##### 1. *Music Claimants May Not Use The 1990-92 Settlement As A Benchmark For The Purpose Of Determining Changed Circumstances.*

Arbitrators and courts routinely refuse to use settlements as benchmarks. The 1991 Satellite Carrier Rate Adjustment Proceeding Panel rejected such a benchmark, stating, "settlements of litigation are to be encouraged and thus not held against any party in the future." 57 Fed. Reg. 19052 at 19058 (May 1, 1992). In *Office of Consumers' Counsel v. FERC*, 783

F.2d 206, 234-35 (D.C. Cir. 1986) the D.C. Circuit reversed a Federal Energy Regulatory Commission rate-setting decision which was based on a prior settlement amount.

The language of the Stipulation precludes using the agreed share as a benchmark. The Stipulation plainly states that: "No party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation." Stipulation at 1. The Panel should rely on the express agreement of the parties, rather than Music Claimants' speculation that the settling parties' motivation for settlement was an implicit recognition of music's value. *See* Music Proposed Findings at 6 (§ 22). Accordingly, the settlement share cannot be used as a starting point for setting Music's award.

*2. Music Claimants' Impromptu 1983 Music Use Study Is Unreliable.*

Music Claimants' 1983 Music Use analysis contains too little data to form a proper basis for a benchmark. It only incorporates music time from WTBS and WGN. Krupit written rebuttal, 1-2. Admittedly, the studies "do not have the quality of music use information for programs broadcast on stations carried as distant signals in 1983 to make an "apple to apples" comparison." *Id.* They lacked episode identifications and relied heavily on average cue sheets. *Id.* at 4-5. Thus, the 1983 study should not serve as a benchmark.

Fortunately, there is no need to use the 1983 or the 1990-92 benchmark because a better alternative exists. This alternative, Dr. Schink's license fee comparison, is tested by time and supported by precedent. The best measure of the value of musical works on distant signals is the same type of survey that the CRT originally relied upon to determine the relative market value of musical works on distant signals: a comparison of license fees for musical works to total programming expenditures in analogous markets.

*3. Precedent Supports The Use Of Dr. Schink's Comparison Of  
Programming Expenditures And Musical Works License Fees.*

The original awards for Music Claimants were based upon a comparison of music license fees paid by local stations as a percentage of the programming expenses of such stations. Music Proposed Findings at 17-18 (¶¶ 61-63). Precedent supports the use of a similar study for 1998-99.

a. Past proceedings.

In the inaugural Section 111 CRT proceeding, ASCAP and SESAC jointly offered a marketplace comparison between the amount television broadcasters paid for music performing rights and the amounts paid for performing rights in other copyrighted material. 45 Fed. Reg. 63026 at 63030. The CRT noted, "ASCAP considered this comparison appropriate because the broadcast industry is mature, while the cable industry is still in its infancy." *Id.*, citing 1978 Proposed Findings of Fact and Conclusions of Law of ASCAP and SESAC, 2.

In the same proceeding, BMI proposed that, "the division of royalties should be based upon the amount of time various categories of copyrighted works were retransmitted." 45 Fed. Reg. at 63030. The CRT rejected BMI's proposed allocation, which bears resemblance to the 1998-99 Music Use Study, on the grounds that the data and methodology employed were erroneous and lacking in probative value. 45 Fed. Reg. at 63040. Stating that ASCAP and SESAC's license fee comparison is a factor used to value musical works, the CRT adjusted for study errors and awarded a 4.5% royalty share.<sup>14</sup>

In the 1979 CRT proceeding, music's award was, once again, based upon a comparison of music license fees to other programming expenditures. 47 Fed. Reg. 9879 at 9894. The

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<sup>14</sup> This figure represents an award for both music on radio re-transmissions and music as a program element. 45 Fed. Reg. at 63040.

actual percentage allocated for music as a program element was 3.7%. *Id.* The radio re-transmissions boosted Music's share to 4.25%.

Music's case in the 1980 CRT proceeding, "differed substantially from that of previous proceedings." 48 Fed. Reg. 9552 at 9566. While the 1978 and 1979 proceedings used music license fee data from broadcast stations, Music Claimants claimed such evidence was unreliable because the license fees were negotiated over a dozen years before. *Id.* The CRT thus discarded evidence about declining music license fees for television broadcasts and held that a 4.25% award was still reasonable. 48 Fed. Reg. at 9566-67.

In the 1983 proceeding, "Music did not offer any new evaluative measures." 51 Fed. Reg. 12792 at 12812. Rather than relying on empirical data, the CRT's valuation decision appears to have rested upon the emergence on distant signals of such programs as *Solid Gold*, *Midnight Special*, and *Night Tracks*. *Id.* at 12801 (changed circumstances are entirely related to music videos); *id.* at 12812 ("a new concept in programming occurred in the period between 1980 and 1983"). The music-video evidence of "changed circumstances" supported an increase to 4.5%.

The last time that the CRT relied on an empirical study of music's marketplace value on distant signals was the 1979 proceeding in which fees paid for music rights was compared to other programming rights expenses. *See* 51 Fed. Reg. 12792; 48 Fed. Reg. 9552; 47 Fed. Reg. 9879; and discussion *supra*. 47 Fed. Reg. at 9894. The same evidence appeared in 1978. 45 Fed. Reg. at 63040. Since the last data-based royalty awards for Music came from license fee comparisons it makes sense to rely on a similar study in 1998-99.

b. The problems of past license fee studies do not appear here.

This Panel may properly rely on a license fee comparison for a valuation of music on distant signals in 1998-99. Music videos do not impact distant signals as they did in 1983.

Krupit, tr. 4314-18. And, unlike 1980, recent license fee agreements, Rate Court decisions, private source data, and census data provide a great deal of recent information about the marketplace value of music on television. See Schink written rebuttal, 14, 18-19; tr. 8637, 8680, 8769; Boyle, tr. 4679, 4728-39, 4768.

*4. The Changed Circumstances Of The Marketplace Support Relying Upon A Comparison Of Music License Fees To Programming Expenses.*

Dr. Schink's fresh license fee analysis is preferable to Music's benchmark study. First, Dr. Schink replicated and updated the studies that are the actual source for the benchmark study. Second, the 1978 and 1979 empirical studies that form the basis of Music's subsequent awards use data only from over-the-air broadcast stations, and not from cable networks. This was because the broadcast industry was mature, while the cable industry was still in its infancy. 45 Fed. Reg. at 63030, *supra*. Now, the cable industry is mature, both in market penetration and channel options. Ringold, tr. 5575; Gruen, tr. 7726; PS Ex. 1-X (increasing cable penetration); Hazlett, 1092-93 (increasing channels). Moreover, prior Panels recognized that cable networks are analogous to distant signals. 1990-92 CARP Report at 24 ("this simulated market looks a great deal like the cable network market"). Since Music's original awards, and progeny benchmarks, were based on data that fail to encompass the current universe, they can no longer be the basis for awards. Instead, the license fee analysis of commercial television and cable network fees that Dr. Schink presents should be used.

**B. A 2.33% Award Reflects The Value Of Musical Works On Distantly Retransmitted Programming And Radio.**

A 2.33% award is reasonable and is supported by record evidence. Music Claimants also ask for fees attributable to radio carriage. Music Proposed Findings at 76. Dr. Schink's study estimated Music's share at 2.33% for commercial television's 1998 programming costs and 2.07% for 1998-99 cable network program expenses. Schink written rebuttal, 4. In the 1978

decision, the CRT determined a 3.7% share for music as a program element and increased it by about 15% to include radio retransmissions. Here, 2.07% represents Music's share of program expenses that cable networks paid. A 15% increase, like that in 1978, would result in roughly 2.3%. A determination that royalty fees for music as a program element constitutes a relative 2.07% share with a 15% increase for radio still places Music's share within a range supported by record evidence.

**C. Music Claimants' Share Should Be Taken "Off The Top".**

Because Music Claimants offer a blanket license that covers unlimited access, selection, and use along with indemnification from infringement suits, basing a differential requisition on music use alone does not comport with marketplace practice. *See* Music Proposed Findings at 13, 65. Further, all evidence of variations in use between the claimant groups comes from only a handful of music cue sheets. Schink, tr. 8458, 8457-59; NAB Ex. 40-RX; Krupit, tr. 4334-35; JSC Ex. 32-X. Simply put, neither music use studies nor license fee comparisons provide enough evidence to alter the 20-year practice of taking Music's share "off the top".



## **V. REPLY TO CANADIAN CLAIMANTS.**

### **A. Cable Operators' Selling Price of Canadian Distant Signals Has Dropped Since 1990-92.**

While the number of subscribers to Canadian signals has increased since 1990-92, the amount of fees generated from these signals has remained the same. CAN Proposed Findings at 3-4, 23, 27 (¶¶ 61-2, 69-73). The number of subscribers increased in that period more than 25%. CAN Proposed Findings at 48. In the same time, fees generated for Canadian signals dropped by \$ 92,550.<sup>15</sup> CAN Proposed Findings at 25 (¶ 64) Thus, the royalty fee cost-per-subscriber for Canadian signals decreased at least 25%

Cable operators pay royalty fees based upon a statutorily set percentage of revenue from the tier of programming on which the distant signals are located. CAN Proposed Findings at 17 (¶ 44). Therefore, fluctuations in royalty payments are an indicator of corresponding changes in gross revenue derived from distant signal carriage. While not a perfect ratio due, in large part, to differing DSE levels, it is generally true that as revenues go up, so do royalties. Ducey, tr. 1838, 1844.

It is commonly understood that in order to generate more revenues, one must either (1) sell more products, or (2) charge higher prices. Yet when cable operators sell more product (additional subscribers) without an increase in revenue, it means only that the cost of the product is decreasing. The price a seller sets is largely a function of the value of the product. PS Proposed Findings at 48 (¶¶ 308-09). It follows that since operators are selling more Canadian signals for slightly less money, the value cable operators place on Canadian signals has decreased since 1990-92.

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<sup>15</sup> An average of the CDC allocation for 1998-99 (\$1,207,267.5) was subtracted from an average of 1991-92 (\$1,299,817.5).

**B. An Increase In Canadian Content Does Not Indicate Cable Operator Preference.**

At the same time cable operators were charging households less to receive Canadian distant signals, the Canadian content on these signals was increasing. CAN Proposed Findings at 4, 29 (¶ 74). Accordingly, it cannot be said that an increase in Canadian content creates more value for the cable operator. Precisely the opposite is true and further demonstrates that the Canadian content is not what operators value on the Canadian signal. See PS Proposed Findings at 234 and discussion *infra*.

**C. Cable Operators Give More Value To U.S. Content Than Canadian Content.**

Although Canadian content on distant signals comprises 80% of average broadcast days, cable operators surveyed in the Ford-Ringold study only ascribed 46%-66% comparative value to this programming on the three major signals that generate the majority of royalties. PS Proposed Findings at 234. The remaining value is ascribed to Program Suppliers and Joint Sports Claimants programming, which provide a mere 20% of the programming. *Id.* Consequently, the respondents assigned relatively greater value to U.S. content on Canadian signals. This defeats Canadian Claimants' assertion that "U.S. cable operators carry Canadian signals for the unique Canadian content." CAN Proposed Findings at 30 (¶ 78).

**D. Canadian Claimants Should Receive 1.47% Of 1998's Basic Fund And 1.56% Of 1999's Basic Fund.**

Cable operators have discounted the market price of Canadian programming by at least 25% and their survey responses give greater value to U.S. programming. See discussion *supra*. This warrants a downward adjustment in Canadian Claimants' share of the fees generated on Canadian distant signals. Further, the problems inherent in the Ford-Ringold cable operator survey make it an unreliable indicator of value. Accordingly, the shares supported by the study

results should be reduced by one-quarter, creating Canadian value components of 44.25% and 43.5% of Canadian fees generated in 1998 and 1999, respectively.

### **CONCLUSION**

For the foregoing reasons, the Panel should order Cable Royalty distribution awards to the claimants in the percentage amounts outlined by Program Suppliers in their Proposed Findings of Fact and Conclusions of Law filed August 20, 2003.

Respectfully submitted,

**STINSON MORRISON HECKER LLP**

A handwritten signature in black ink, appearing to read 'Michael E. Tucci', is written over a horizontal line.

Michael E. Tucci  
Gregory O. Olaniran  
Robert L. Eskay, Jr.  
Sarah K. Johnson  
1150 18<sup>th</sup> Street, NW, Suite 800  
Washington, DC 20036  
(202) 785-9100

Attorneys for  
PROGRAM SUPPLIERS

## **CERTIFICATE OF SERVICE**

I, Gregory O. Olaniran, hereby certify that I have caused a copy of the foregoing document in Docket No. 2001-8 CARP CD 98-99 to be served via hand-delivery or Federal Express as indicated below, this 5<sup>th</sup> day of September 2003, to the following:

### **ASCAP**

Carol A. Witschel  
Stefan M. Mentzer  
White & Case  
1155 Avenue of the Americas  
New York, NY 10036-2787  
One (1) copy via Federal Express

Samuel Mosenkis  
ASCAP  
One Lincoln Plaza  
New York, NY 10023  
One (1) copy via Federal Express

### **BMI**

Michael J. Remington  
Philip J. Mause  
Jeffrey J. Lopez  
Drinker Biddle & Reath LLP  
1500 K Street, NW, Suite 1100  
Washington, DC 20005  
*Two (2) copies via hand delivery*

### **Joint Sports Claimants**

Robert Alan Garrett  
James Cooper  
Christopher Winters  
Michele T. Dunlop  
Arnold & Porter  
555 Twelfth Street, NW  
Washington, DC 20004-1206  
Two (2) copies via hand delivery

### **SESAC**

John C. Beiter  
Loeb & Loeb  
45 Music Square West  
Nashville, TN 37203  
Two (2) copies via Federal Express

### **National Association of Broadcasters**

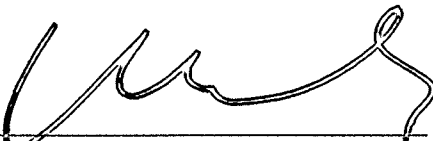
John I. Stewart, Jr.  
Parul Desai  
Michael Lazarus  
Crowell & Moring, LLP  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004  
Two (2) copies via hand delivery

### **Public Television Claimants**

Timothy C. Hester  
Ronald G. Dove, Jr.  
Russell Jessee  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
Washington, DC 20044-7566  
Two (2) copies via hand delivery

**Canadian Claimants**

L. Kendall Satterfield  
Finkelstein, Thompson & Loughran  
1055 Thomas Jefferson Street, NW, Suite 601  
Washington, DC 20007  
Two (2) copies via hand delivery

  
\_\_\_\_\_  
Michael E. Tucci